

## *Reparations at the ICC: The Need for a Human Rights Based Approach to Effectiveness*

Carla Ferstman\*

### *A. Introduction*

When the International Criminal Court (ICC) Statute was adopted, there was hope in some quarters that the reparations provisions would make a difference to victims' lives. The provisions reflected a new dual orientation of international criminal justice – not only retributive and perpetrator-focussed, but also reparative, aimed at helping to address victim harms and restore dignity.<sup>1</sup> However, this dual orientation was controversial then and remains so today. The reparations mandate is not simply accepted or understood in the same way by all stakeholders inside and outside of the Court.<sup>2</sup> The job of implementing reparations (as well as what one might understand as effective implementation) has therefore been complicated by competing visions about the main goals the Court should be concentrating on and how reparations fit within those goals.

This chapter focuses on the effectiveness of reparations at the ICC. It analyses the work of the ICC and the Trust Fund for Victims in awarding and implementing reparations to victims. It considers the process as well as the outcomes on reparations in those cases where reparations orders have been made as well as the assistance mandate of the Trust Fund. It does not review all

---

\* Senior Lecturer, University of Essex School of Law. An abridged version of this chapter has been published by the Centre for Criminology at the University of Oxford and the International Criminal Court Bar Association (ICCBA) as part of their joint project: 'Advancing the Impact of Victim Participation at the International Criminal Court: Developing Avenues for Collaboration'.

<sup>1</sup> Discussed in Carla Ferstman, 'The Reparation Regime of the International Criminal Court: Practical Considerations', (2002) 15(3) *Leiden J Intl L* 667.

<sup>2</sup> Some of the controversies are explored in Chris Muttukumaru, 'Reparations to Victims', in Roy S. Lee (ed), *The International Criminal Court The Making of the Rome Statute: Issues, Negotiations, Results* (The Hague: Brill 1999) 262–264.

aspects of the reparations process, but instead focuses on key trends from which patterns can be ascertained and goes on to consider what steps might be taken to improve effectiveness.

The chapter concludes that the competing approaches to the purpose of reparations have led to vastly different perspectives on what would constitute effective reparations. These different perspectives have made it difficult for the Court to adopt a unified vision to improve reparations outcomes. The lack of unity has hampered the kind of strategic thinking and decision-making necessary to make reparations work effectively, taking into account the built-in constraints of the Statute. The more the failings become evident, the more pressure is on the system to find quick fixes or to narrow the objectives which ultimately reduce the prospects for effectiveness further. This is a cyclical problem which does not end well for the victims who continue to await – with growing impatience - reparations.

Adopting a human rights based approach to effectiveness would help the Court to develop victim-centred thinking, which is essential for effective reparations. It would also assist to inculcate a culture of institutional accountability and transparency towards the victim stakeholders of reparations. Despite the *sui generis* character of ICC proceedings, recognising that victims should have a right to expect effective reparations procedures and clear outcomes, and that the ICC is accountable to deliver them, may help reorient the process.

#### *B. A Quick Stock-Taking on the Court and Reparations Proceedings*

There is a ‘crisis of confidence’ currently affecting the ICC, which arguably permeates the entire fabric of the institution, and has led four former presidents of the Court’s Assembly of States Parties to lament recently the ‘growing gap between the unique vision captured in the Rome

Statute, the Court's founding document, and some of the daily work of the Court.' They expressed that they are 'disappointed by the quality of some of its judicial proceedings, frustrated by some of the results, and exasperated by the management deficiencies that prevent the Court from living up to its full potential.'<sup>3</sup> This crisis has come to the fore with the 12 April 2019 Pre-Trial Chamber decision rejecting the request of the Prosecutor to investigate alleged crimes committed in Afghanistan,<sup>4</sup> partly on the basis of a contorted ruling on 'the interests of justice'.<sup>5</sup> It is also accentuated by recent acquittals (for which both the Office of the Prosecutor and the relevant Chambers have been blamed in equal measure),<sup>6</sup> and the failure of many states to cooperate with the ICC and surrender accused persons against whom there are outstanding arrest warrants. This is coupled with an approach taken by the Court to immunities which according to a number of states, conflicts with their other obligations and ignores international law.<sup>7</sup>

This 'crisis of confidence' is relevant to the question of reparations, to the extent that it will result in a strategic re-focusing on 'the core mandate'<sup>8</sup> of the ICC to get the Court 'back on track'. There is a tendency to associate the 'core mandate' of the ICC with a narrow focus on prosecutions, only or mainly.<sup>9</sup> As Vasiliev has argued in relation to the Court's views on such

---

<sup>3</sup> See, e.g., Prince Zeid Raad Al Hussein, Bruno Stagno Ugarte, Christian Wenaweser and Tiina Intelman, 'The International Criminal Court Needs Fixing', *The Atlantic Council*, 24 April 2019.

<sup>4</sup> Situation in the Islamic Republic of Afghanistan, 'Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan', ICC-02/17-33, 12 April 2019.

<sup>5</sup> Dov Jacobs, 'ICC Pre-Trial Chamber rejects OTP request to open an investigation in Afghanistan: some preliminary thoughts on an ultra vires decision' *Spreading the Jam*, 12 April 2019.

<sup>6</sup> Ben Batros, 'The ICC Acquittal of Gbagbo: What Next for Crimes Against Humanity?' *Just Security*, 18 January 2019; Alex Whiting, 'Appeals Judges Turn the ICC on its Head with Bemba Decision', *Just Security*, 14 June 2018.

<sup>7</sup> Summarised by Dapo Akande, 'ICC Appeals Chamber Holds that Heads of State Have No Immunity Under Customary International Law Before International Tribunals', *EJIL Talk*, 6 May 2019.

<sup>8</sup> See for instance, the United Kingdom statement to the ICC Assembly of States Parties 17th session, 5 December 2018: 'the Court ... must focus on its core and essential task, set out under the Statute. If it acts otherwise, it risks eroding the confidence States have in the Court and the integrity of the system. It adds to the Court's ever-growing backlog of cases. And it increases the length of time taken for Investigations and Preliminary Examinations – some of which are as old as the Court itself. This situation is not sustainable.' (available on the website of the Assembly of States Parties).

<sup>9</sup> Shahram Dana, 'The Limits of Judicial Idealism: Should the International Criminal Court Engage with Consequentialist Aspirations?' (2014) 3(1) *Penn State J L & Intl Affairs* 30, who cautions at 110 that 'international

matters, '[r]estorative ambitions must be tempered in part of the core criminal process (as opposed to its 'reparations add-on') and efforts intensified to manage the expectations among victims and affected communities.'<sup>10</sup> Clearly, a focus on prosecutions necessarily involves victims, however it is the recognition of victims' agency and rights which has been perceived by some – including former Court officials<sup>11</sup> and even some sitting judges<sup>12</sup> - as a distraction and hindrance to the Court, and an impediment to achieving the “core mandate” as it has been narrowly perceived by them. Already, in somewhat of a response to the crisis of confidence, the Prosecutor, in her newest draft strategic plan, ‘embraces an approach of bringing cases that are more modest – either narrower in scope or against lower-level accused.’<sup>13</sup> This may result in easier to achieve convictions, but it also means that fewer victims, and not necessarily those who suffered the most egregious forms of harm, will have access to reparations.

Even without taking into account this wider “crisis of confidence”, a snapshot on reparations reveals a bleak picture. In some cases, reparations have plodded forward at a snail's pace – it has taken a long time to get to a final decision on reparations, but even then, the delays with implementation have been significant, and quite clearly unacceptable. There are many busy and committed people rushing around doing a lot of work on reparations, but not much actual reparation has been achieved, for anyone.

---

judges often veer off course away from their primary role in light of the realistic capacity of international criminal courts when attempting to achieve other well-meaning goals that are beyond the institutional capacity of international criminal courts. This results in problematic rulings, distortion of responsibility or accountability, and ultimately failure to achieve the desired aspirations because of institutional and structural limitations.'

<sup>10</sup> Sergey Vasiliev, 'Victim Participation Revisited: What the ICC is Learning about Itself', in Carsten Stahn (ed) *The Law and Practice of the International Criminal Court* (Oxford: OUP 2015).

<sup>11</sup> Christine Chung, 'Victims' Participation at the International Criminal Court: Are Concessions of the Court Clouding the Promise?' (2008) 6(3) *Northwestern J Intl HR* 459.

<sup>12</sup> Christine Van den Wyngaert, 'Victims before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge', (2011) 44 *Case Western Reserve J Intl L* 475.

<sup>13</sup> Alex Whiting, 'ICC Prosecutor Signals Important Shift in New Policy Document', *Just Security*, 17 May 2019.

The problem of reparations has not simply been a ‘problem’ of acquittals or limited or narrow prosecutions<sup>14</sup> – it is a much more fundamental problem about the lack of a common vision about what successful reparations look like, and at best lukewarm commitment to doing what would be necessary to achieve anything beyond tokenism.

### *C. Key Structural Challenges Associated with the Reparations System before the ICC*

Some of the challenges the reparations system faces today are structural and are traceable to the framework set out in the ICC Statute and Rules of Procedure and Evidence. This section provides an overview of this structure and identifies some of the challenges associated with it.

A first challenge is reparations tied to individual criminal responsibility - against ‘a convicted person’.<sup>15</sup> The reparations process is connected to a criminal court and reparation flows not just from the decisions about who to prosecute and for what crimes, but on the success of such prosecutions. As with the *Lubanga* case, if the Prosecutor narrowly frames the indictment, decides not to proceed with charges, or not to bring new charges to reflect evidence of additional criminality coming out during the trial, this will limit who is eligible for reparations.<sup>16</sup> The *Lubanga* Appeals Chamber determined that reparations orders are intrinsically linked to the individual whose criminal liability is established in a conviction and whose culpability is determined in a sentence.<sup>17</sup> While some authors of submissions had encouraged the Court to take

---

<sup>14</sup> The impact of limited or narrow prosecutions on reparations is considered in Carla Ferstman, ‘Limited charges and limited judgments by the International Criminal Court – who bears the greatest responsibility?’ (2012) 16(5) *Intl J HR* 796.

<sup>15</sup> Article 75(2) ICC Statute. This ‘perpetrator-focussed’ reparations is discussed in Carsten Stahn, ‘Reparative Justice after the *Lubanga* Appeal Judgment: New Prospects for Expressivism and Participatory Justice or “Juridified Victimhood” by Other Means?’ (2015) 13 *J Intl Crim J* 801.

<sup>16</sup> Ferstman (n 14).

<sup>17</sup> Prosecutor v. Thomas Lubanga Dyilo, ‘Judgment on the appeals against the “Decision establishing the principles and procedures to be applied to reparations” of 7 August 2012 with AMENDED order for reparations (Annex A) and

a broader approach to reparations,<sup>18</sup> the Appeals Chamber held that reparations had no autonomous meaning outside of the conviction. In this light it held, for instance, that because they were not included in the sentence on guilt, sexual and gender-based violence could not be defined as a *harm* for the purposes of reparations resulting from the crimes for which Mr Lubanga was convicted.<sup>19</sup>

Similarly, as with the *Bemba* case, if there is an acquittal, there will be no Court-ordered reparations for victims associated with those proceedings; '[t]he Chamber must respect the limitations of this Court and recalls that it can only address compensation for harm suffered as a result of crimes when the person standing trial ... has been found guilty.'<sup>20</sup> In the same way, the Kenyan post-election violence cases which ultimately collapsed or were withdrawn prior to trial did not and could not result in Court-ordered reparations.

Tied to this limitation on the 'convicted person', is the fact that individuals who perpetrate international crimes rarely, if they ever, act alone.<sup>21</sup> Their crimes are fostered by the structures (e.g., governments, rebel movements, criminal enterprises, companies) that provide a cushion of support. Even though evidence of these connections may come out during the trial, and these groups may have benefited financially from the commission of crimes carried out by defendants, the ICC may only make an award against 'a convicted person', and reparations orders can only be

---

public annexes 1 and 2', ICC-01/04-01/06-3129, ("Lubanga Reparations Appeal") 3 March 2015, para. 65. See also, para. 99.

<sup>18</sup> See, e.g., the submissions of the Trust Fund for Victims, in which it was argued that the objective of reparations of providing redress for victims following a guilty verdict allowed, by virtue of Article 75(2) of the Statute, for a broader scope to reach a greater number of victims. See, Prosecutor v. Thomas Lubanga Dyilo, 'Public Redacted Version of ICC-01/04-01/06-2803-Conf-Exp-Trust Fund for Victims' First Report on Reparations', ICC-01/04-01/06, T.Ch. I, 1 September 2011, ("Lubanga case: Trust Fund First Report on Reparations") paras. 30-45.

<sup>19</sup> Ibid, para. 196.

<sup>20</sup> Prosecutor v. Jean-Pierre Bemba Gombo, 'Final decision on the reparations proceedings', ICC-01/05-01/08-3653, 3 August 2018, para. 3.

<sup>21</sup> This conundrum is considered in Nadia Tapia Navarro, 'Collective Reparations and the Limitations of International Criminal Justice to Respond to Mass Atrocity', (2018) 18 *Intl Crim L Rev* 67, 79- 81.

enforced against convicted persons – even if those persons were associated with a governmental or corporate apparatus when they committed the crimes. This complicates asset recovery.<sup>22</sup>

In *dicta*, chambers have commented on state responsibility. In *Katanga*, for example, the Trial Chamber reminded that reparations orders are without prejudice to the state's responsibility for reparations. It ordered the Trust Fund to contact authorities in the Democratic Republic of the Congo (DRC) to discuss the state's possible contribution to reparations and cooperation in the implementation of the award.<sup>23</sup> In the *Al Mahdi* reparations order, the chamber indicated that 'the present order does not exonerate States from their separate obligations, under domestic law or international treaties, to provide reparations to their citizens. Further, States Parties have the obligation to fully cooperate during all stages of reparations proceedings, in particular during the implementation phase, where their cooperation is especially necessary.'<sup>24</sup>

The narrow focus on the convicted person is at the root of much of the discontent of victims on the ground, who cannot comprehend why 'their' crimes did not result in reparations when other victims' crimes did, and why the levers of power that fostered the crimes remain untouchable.<sup>25</sup> Consequently, some organizations have argued that the more flexible mandate of the ICC's Trust Fund for Victims should be privileged above Court-ordered reparations.<sup>26</sup> One could take those arguments even further and question the utility of any reparations process inside the ICC. Is the rights-based approach of reparations a framework that works better with state defendants? Can

---

<sup>22</sup> Carla Ferstman, 'Cooperation and the International Criminal Court: The Freezing, Seizing and Transfer of Assets for the Purpose of Reparations' in Olympia Bekou and Daley Birkett (eds), *Cooperation and the International Criminal Court: Perspectives from Theory and Practice* (The Hague: Nijhoff/Brill, 2016) 227.

<sup>23</sup> The Prosecutor v. Germain Katanga, 'Order for Reparations pursuant to Article 75 of the Statute', ICC-01/04-01/07-3728-tENG, 24 March 2017, ("Katanga reparations order") paras. 323-325.

<sup>24</sup> The Prosecutor v Ahmad Al Faqi Al Mahdi, 'Reparations Order', ICC-01/12-01/15-236, 17 August 2017, ("Al Mahdi reparations order") para. 36.

<sup>25</sup> See, e.g., the chapter by Mariana Goetz in this volume.

<sup>26</sup> Marieke Weirda and Pablo de Greiff, 'Reparations and the International Criminal Court: A Prospective Role for the Trust Fund for Victims', International Center for Transitional Justice, 2004.

reparations work at all in the context of international criminal law proceedings where the lens is focused tightly on individual criminal responsibility?<sup>27</sup> Might it have been more effective if the international community would have simply supported local reparations efforts in countries affected by ICC proceedings and not have gotten caught up in the intricacies of attempting to do reparations within the confines of criminal procedure?

On the one hand, a separated reparations process might have helped foster more adequate and effective reparations that correspond to the range of victimisation in the country without being limited by a narrow set of crimes. Also, it might have been a way to engage the responsibility of states and other actors, and might have a more lasting domestic impact. On the other hand, the vision of an ICC as a Court with the mandate to not only prosecute perpetrators but also support and afford reparations to victims is inherently important. The reparative naturally and inextricably connects to the retributive and this should be evidenced by the proceedings.

Furthermore, tying reparations to the ICC ensures (at least in principle if not yet in practice) that a modicum of reparations takes place. Past attempts to establish international trust funds to support reparations for victims of conflict have not succeeded. Take for example, the recommendation of the International Commission of Inquiry on Darfur to set up a compensation commission, or the recommendation of the ICTY and ICTR presidents to establish mechanisms to support victims on the back of the establishment of those tribunals.<sup>28</sup> These recommendations were not heeded. Similarly, the same reasons why domestic courts are deemed unable or unwilling to proceed with an investigation or prosecution would likely apply to domestic reparations processes – there is no evidence that states who lack the will or capacity to investigate or prosecute are

---

<sup>27</sup> Frédéric Mégret, 'Of Shrines, Memorials and Museums: Using the International Criminal Court's Victim Reparation and Assistance Regime to Promote Transitional Justice', (2010) 16 *Buffalo Hum Rts L Rev* 1, 11

<sup>28</sup> Discussed in Ferstman (n 1).



imbued with the will and capacity to establish and run effective and transparent reparations processes. Victims' needs tend to be an afterthought; the incorporation of the reparations mandate in the ICC Statute is vital for these reasons – it *should* prevent victims' needs and rights from being ignored.

*D. Issues of interpretation and implementation that are more within the control of the Court and/or Trust Fund*

An overriding challenge is the vagueness of ICC reparations provisions. In part because of the divergences of views amongst states at Rome, only a bare-bones framework on reparations was included in the Statute,<sup>29</sup> which was only marginally expanded upon and clarified in the Rules of Procedure and Evidence.<sup>30</sup> The Court never adopted institution-wide principles on reparations to guide its overall work though arguably it was mandated to do so under Article 75(2).<sup>31</sup> It opted instead to leave the process of clarification to individual chambers in the context of particular cases.<sup>32</sup> This approach affords the different chambers flexibility to put in place procedures that correspond to the particular circumstances of victimisation in individual cases. However, another view is that the judges were simply unable to agree a common approach, and the lack of clarity can and has contributed to administrative delays, as predicted.<sup>33</sup> While each chamber decides how

---

<sup>29</sup> Muttukumaru (n 2).

<sup>30</sup> Rules of Procedure and Evidence 94-99.

<sup>31</sup> Article 75(2) provides: 'The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.'

<sup>32</sup> ICC, Report of the Bureau on victims and affected communities and the Trust Fund for Victims, including reparations and intermediaries, ICC-ASP/12/38, 15 October 2013, para. 9. The utility of principles is discussed in, Susana SáCouto and Katherine Cleary, 'The Case-Based Reparations Scheme at the International Criminal Court', Washington College of Law, War Crimes Research Office, June 2010, pp. 28-31.

<sup>33</sup> Carla Ferstman and Mariana Goetz, 'Reparations before the International Criminal Court: The Early Jurisprudence on Victim Participation and its Impact on Future Reparations Proceedings', in Carla Ferstman, Mariana Goetz and

it will collect and review applications and/or how it will decide upon them, the administrative arm of the Court waits for instructions to organise the work. A bespoke case by case approach means that the Registry is limited in its ability to prepare. Also, the lack of uniformity can lead to arbitrary inconsistencies in approaches taken, impacting on victims' rights and adding to the confusion for victims and their counsel. As victims are limited in their ability to appeal rulings that impact their rights (aside from a few exceptions), there is little they can do.

Despite these overriding challenges, in practice, principles on reparations have been progressively adopted by the different chambers,<sup>34</sup> and there is a slowly developing practise that is starting to go in a consistent direction.

#### 1. The application, verification and assessment process

The Court may, *either upon request or on its own motion in exceptional circumstances*, determine the scope and extent of any damage, loss and injury to, or in respect of victims and will state the principles on which it is acting.<sup>35</sup> To date, both approaches have been used by the Court.

Reparations are typically assessed in response to applications submitted by victims. Such applications would need to comply with the stipulations in Rule 94(1) of the Rules of Procedure and Evidence,<sup>36</sup> but there remains a lot which is unclear in the process. The rules do not specify

---

Alan Stephens (eds), *Reparations for Victims of Genocide, War Crimes and Crimes against Humanity: Systems in Place and Systems in the Making*, (The Hague: Brill 2009) 313, 316.

<sup>34</sup> See, e.g., The Prosecutor v. Thomas Lubanga Dyilo, 'Decision Establishing the Principles and Procedures to Be Applied to Reparations', ICC-01/04-01/06-2904, ("Lubanga First Reparations Decision on Principles and Procedures") 7 August 2012; Lubanga Reparations Appeal (n 17).

<sup>35</sup> Article 75 ICC Statute.

<sup>36</sup> Rule 94(1) provides: 'A victim's request for reparations under article 75 shall be made in writing and filed with the Registrar. It shall contain the following particulars: (a) The identity and address of the claimant; (b) A description of the injury, loss or harm; (c) The location and date of the incident and, to the extent possible, the identity of the person or persons the victim believes to be responsible for the injury, loss or harm; (d) Where restitution of assets, property or other tangible items is sought, a description of them; (e) Claims for compensation; (f) Claims for rehabilitation and

when applications should be submitted, nor what role the Registry should play in identifying potential applicants and collecting information. This is one area where chambers' practice has varied significantly. In the earliest cases, reparations applications were received at any time, often well in advance of a conviction. Over time, however, early applications have been discouraged, perhaps with good reason, in order not to raise hopes about a reparations process until it is somewhat clearer that one will happen, and once it becomes clearer who may be eligible for reparations.<sup>37</sup>

On occasion, the Court has determined victims' eligibility on its own motion or has supplemented victim applications with an own motion "top up" approach. It has invited the Registry, the Trust Fund or others such as the Office of the Public Council for Victims (OPCV) to identify potential beneficiaries of reparations. While this has ultimately helped to provide a more holistic picture, the *ad hoc* approaches to beneficiary identification employed by different chambers have arguably heightened unpredictability.<sup>38</sup>

For instance, different approaches have been taken by chambers in respect to whether reparations awards should be restricted to, or should privilege, individuals that submitted applications for reparations. The distinctions impact fundamentally victims' access to justice and underscore how judges and others understand the purpose of reparations within the ICC system. As the approach of the chambers is not known in advance, some victims may be caught out by surprise and closed out of processes. As Delagrangé noted in 2018, '[p]resently it is still unclear

---

other forms of remedy; (g) To the extent possible, any relevant supporting documentation, including names and addresses of witnesses.'

<sup>37</sup> Naturally this couldn't address the raised expectations of the many victims who had applied for reparations in the *Bemba* case.

<sup>38</sup> See, REDRESS, 'No Time to Wait: Realising Reparations for Victims before the International Criminal Court', 2019, 40-42.

whether individual victims are *de facto required* to request reparations during the proceedings in order to be considered as potential beneficiaries.<sup>39</sup> This remains unclear.

In the *Lubanga* case, the Trial Chamber refused to consider the individual applications that had already been filed which gave expression to victims' views on appropriate forms of reparations. This failure to take into account the applications was not overruled by the Appeals Chamber. Instead, the Trial Chamber tasked with overseeing the implementation of reparations in the case ordered the Trust Fund to identify additional victims who could potentially be eligible for collective reparations.<sup>40</sup> In the *Katanga* case, the Trial Chamber decided to restrict the beneficiaries to those who had already submitted individual applications.<sup>41</sup> In this case the identity of the victims was relatively well-known, given that it concerned attacks on a single village on a single day; perhaps that explains the Court's narrow focus on beneficiaries that had already been determined through the application process, though this is not expressly stated by the chambers. The facts were very different in the *Bemba* case, which involved a much more complicated crime context and a wider array of victims. Despite these differences, the group of experts advising on reparations surprisingly recommended that the Chamber restrict itself to individuals who had already submitted applications at the time of its review.<sup>42</sup> This approach was recommended mainly on the grounds of expediency, even though it could not have been clear at the time that community

---

<sup>39</sup> Mikel Delagrangé, 'The Path towards Greater Efficiency and Effectiveness in the Victim Application Processes of the International Criminal Court', (2018) 18(3) *Intl Crim L Rev* 540, 548.

<sup>40</sup> The Prosecutor v. Thomas Lubanga Dyilo, 'Corrected version of the "Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable"', ICC-01/04-01/06-3379-Red-Corr-tENG, 21 December 2017.

<sup>41</sup> Katanga reparations order (n 23), para. 43.

<sup>42</sup> The Prosecutor v. Jean-Pierre Bemba Gombo, Expert Report on Reparation, 'Public Redacted Version of "Annex, 28 November 2017, ICC-01/05-01/08-3575-Conf-Exp-Anx-Corr2"', ICC-01/05-01/08-3575-Anx-Corr2-Red 30-11-2017, 28 November 2017, ("Bemba expert report") paras. 41 – 51.

outreach on application processes and deadlines had been effective, and consequently it would have been likely that some of the most vulnerable victims would be excluded.<sup>43</sup>

The experts suggested an exception – the deadline should be extended for surviving victims of rape and children born of rape, deemed by the group of experts to be ‘among the most serious crimes with particularly severe consequences for the victims.’<sup>44</sup> While any extension clearly would have been helpful, the rationale for this particular exception was not clear, coming without a fuller evaluation of harms. In the end, this ultimately became moot when Bemba was acquitted and the reparations process shut down. Nevertheless, the experts’ approach remains on the table. In *Al Mahdi*, the Trial Chamber held that individual reparations should be determined ‘on the basis of the extent of the harm suffered or sacrifice made, rather than solely on whether a victim had applied for reparations’.<sup>45</sup> Thus here, like in the *Lubanga* case, there was a need to identify new potential beneficiaries.

A separate concern is the Registry’s hands-off approach when assisting victims to apply and helping to address evidentiary gaps with their applications. The Victim Participation and Reparations Section (VPRS) of the Registry is responsible for supplying and collecting victims’ application forms and assisting victims to supply any additional or missing information,<sup>46</sup> though their role has been relatively hands-off. Experience from domestic and international mass claims processes makes clear that an active Registry that supports victims’ efforts to substantiate their

---

<sup>43</sup> See, the Human Rights Chamber of Bosnia and Herzegovina in the case of *Ivica Kevesevic v. the Federation of Bosnia and Herzegovina*, CH/97/46, 10 September 1998. The applicant was arbitrarily deprived of his right to reclaim his right to occupy his pre-war apartment because of the operation of an unrealistic time period in which he could make a claim: ‘It is not acceptable that a law should deprive persons permanently of their rights if they do not fulfil a wholly unreasonable condition, such as the time-limit referred to, which could not possibly be fulfilled by the vast majority of those affected. This Law does therefore not meet the requirements of the rule of law in a democratic society.’ [para. 57]. Discussed in the chapter by Ferstman and Rosenberg, in this volume.

<sup>44</sup> Bemba expert report (n 42), para. 48.

<sup>45</sup> *Al Mahdi* reparations order (n 24), para. 78.

<sup>46</sup> ICC Regulations of the Court, 88(2).

claims and connects the minimal evidence they might have to other sources that might be easier for the Registry to collect and manage, is essential to the reparations process.<sup>47</sup> However, the worry that to be active would somehow impede defence rights has led to an overly cautious approach by the different chambers. Arguably, it should have been possible for the Court to separate out the prosecution and reparation phases of proceedings more clearly - only the former impacting on the presumption of innocence – so that Registry or Secretariat support to the latter phase would not lead to bias or the appearance of bias impacting the presumption of innocence. At the least, in circumstances where it is clear that the funds for reparations would be coming from the Trust Fund as opposed to the convicted perpetrator, there is no reason why the Registry could not be more actively engaged.

## 2. The types of reparations awards that can be adopted

Article 75 of the ICC Statute enables the ICC to order reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. The listing of three different forms of possible reparations and the ability for the Court to provide individual or collective reparations or both, were intended to enable the Court to respond effectively to the different kind of situations coming before it. Nevertheless, the focus on restitution, compensation and rehabilitation is narrower than the framework for reparations that has progressively come to be accepted under human rights law, which in addition to the three forms listed in Article 75, also include satisfaction and guarantees of non-repetition.<sup>48</sup> Presumably, this distinction stems from the ability of the ICC

---

<sup>47</sup> See, e.g., the chapter by Heike Neibergall in this volume.

<sup>48</sup> 'Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law' UNGA Res 60/147, 16 December 2005.

only to make awards against convicted individual perpetrators (as opposed to States or other entities). Arguably, it would be difficult for an individual perpetrator to be ordered to take measures of satisfaction or guarantees of non-repetition – measures typically associated with state responsibility and usually – though not exclusively – implemented by a state.

Nonetheless, in some of the reparations judgments to date, the Court has sought to incorporate measures of satisfaction and guarantees of non-repetition into its rulings.<sup>49</sup> In the *Al Mahdi* reparations order, the chambers indicated that:

Reparations in the present case are designed – to the extent achievable – to relieve the suffering caused by the serious crime committed, address the consequences of the wrongful act committed by Mr Al Mahdi, enable victims to recover their dignity and deter future violations. Reparations may also assist in promoting reconciliation between the victims of the crime, the affected communities and the convicted person.<sup>50</sup>

In the *Katanga* case, Germain Katanga withdrew his conviction appeal and issued a video statement of regret.<sup>51</sup> The expression of regret might have been an important measure of satisfaction for certain victims, however in arguments put before the chamber, victims' legal representatives explained the apology was premature: it is 'at odds with a fundamental principle in Hema culture, according to which a person who has done someone harm must make amends before he or she makes an apology.'<sup>52</sup> That the apology came before victims received reparations was understood as highly problematic. While the Bogoro victims still await the implementation of collective reparations, Germain Katanga's apology seems to have served him well. The Prosecutor decided not to pursue a cross appeal on the judgment to contest Katanga's acquittal on rape and sexual slavery charges, taking into account, amongst other factors, 'Germain Katanga's expression

---

<sup>49</sup> Lubanga First Reparations Decision on Principles and Procedures (n 34), para. 222.

<sup>50</sup> Al Mahdi reparations order (n 24), para. 28.

<sup>51</sup> The Prosecutor v. Germain Katanga, 'Defence Notice of Discontinuance of Appeal', ICC-01/04-01/07-3497, 7 March 2014, paras.1-4. A later video apology is at: Annex 2 to 'Defence Submission of a Video Recording of Mr Germain Katanga', ICC-01/04-01/07-3606-Anx2, 8 October 2015.

<sup>52</sup> The Prosecutor v. Germain Katanga, 'Legal Representative's observations on the reduction of sentence of Germain Katanga', ICC-01/04-01/07-3597-tENG, 18 September 2015, para. 54.

of sincere regret to all those who have suffered as a result of his conduct, including the victims of Bogoro'.<sup>53</sup> Much more promising, the Chamber sought to build upon the Defence Counsel's statement that Katanga was willing to assist. In the reparations order, the Chamber directed the Defence 'to approach the TFV so as to discuss the contribution of Mr Katanga, should that be his desire, to the modalities of reparations, which for instance, could be by way of a letter of apology, public apologies, or the holding of a ceremony of reconciliation once he has served his sentence.'<sup>54</sup> How this might work, now that Katanga is no longer in the custody of the ICC remains unclear.

### *Individual and/or collective forms of reparation*

The Court can award both individual and collective forms of reparations. In essence, individual awards are directed at particular persons - individual victims. They might address actual quantifiable losses or more often in cases involving large numbers of persons, they may provide for some form of standardised payment or other benefit to individuals. Collective awards are likely to be made up of symbolic or commemorative awards, *cypres* remedies or assistance programmes benefiting large numbers of individuals or entire communities of victims.<sup>55</sup>

The ICC Statute and Rules of Procedure and Evidence are vague in their identification of the factors which should determine whether an award is individual or collective or both.<sup>56</sup> Arguably, too little emphasis has been placed on what victims themselves want, whether for reasons of perceived efficiency or possible paternalism – that the Court or Trust Fund is somehow better placed to understand their needs. In the *Lubanga* case, this way of working led to an award

---

<sup>53</sup> The Prosecutor v. Germain Katanga, 'Notice of Discontinuance of the Prosecution's Appeal', ICC-01/04-01/07-3498, 25 June 2014, para. 2.

<sup>54</sup> Katanga reparations order (n 23), para 318

<sup>55</sup> Rules of Procedure and Evidence, 97–98.

<sup>56</sup> Rules of Procedure and Evidence 97(1), 98(3) and (4).



which arguably bore too little correlation with the harm suffered or victims' submissions about needs and circumstances. Though many victims submitted applications for individual reparations, the Trial Chamber favoured 'community-based' reparations recommended by the Trust Fund for Victims, which, it held 'would be more beneficial and have greater utility than individual awards, given the limited funds available and the fact that this approach does not require costly and resource intensive verification procedures.'<sup>57</sup> The Appeals Chamber largely affirmed the Trial Chamber's approach.<sup>58</sup> It held that 'when only *collective* reparations are awarded pursuant to rule 98 (3) of the Rules of Procedure and Evidence, a Trial Chamber is not required to rule on the merits of the individual requests for reparations.'<sup>59</sup> It determined that applicants did not have an intrinsic right to have their applications considered individually. In reaching its decision, it noted that the applicants had included submissions relating to both individual *and* collective awards.<sup>60</sup> Moffett comments on the impact of the failure of the Court to account for victims' needs and preferences, ultimately reducing the effectiveness of reparations:

victims argued against community reparations on the grounds that the community "accepted this behaviour [the recruitment and use of child soldiers in the conflict] for the most part and supported the leaders who engaged in it. Many even collaborated." Accordingly, reparations ordered on a community-basis do not directly remedy the harm suffered by victims, and portrays the Court's reparation regime as symbolic. This may be the result of the judges in the Lubanga case interpreting the ICC reparations regime as serving a more reconciliation or restorative purpose than a remedial one, owing to the defendant being indigent, difficulties in ordering individual reparations to child soldiers of one community in Ituri, and having to rely on the Trust Fund for Victims. The judges may also be trying to overcome the shortcomings of the criminal trial and its limited charges by maximising the scope of beneficiaries of reparations to the community rather than specific

---

<sup>57</sup> Lubanga First Reparations Decision on Principles and Procedures (n 34), para. 274.

<sup>58</sup> Lubanga Reparations Appeal (n 17), para. 214.

<sup>59</sup> Ibid, para. 152.

<sup>60</sup> Ibid, para. 156.

individuals. Nonetheless, such an approach reduces the meaningfulness and effectiveness of reparations in responding to the needs of those most affected by these crimes.<sup>61</sup>

The application process for reparations has been mainly individualised (with some variance in the approaches taken by chambers). An individual application process in which persons identify and quantify the harms they suffered and which then results in no consideration of the individual applications appears inefficient and a waste of victims' and others' time.

In the *Katanga*<sup>62</sup> and *Al Mahdi*<sup>63</sup> cases, reparations awards included both individual and collective elements; indeed in the *Al Mahdi* case, individual reparations awards for both economic loss and moral damage were prioritised, to the extent that they would not hinder reconciliation or result in the stigmatisation of individuals in the community.<sup>64</sup> With *Katanga*, perhaps because there were a finite number of victims, but also because of the submissions made by victims which clarified that they did not see themselves as part of a collective,<sup>65</sup> and in which they overwhelmingly expressed their preference for obtaining financial compensation to help them address the harm they suffered, the judges awarded symbolic compensation amount of USD 250 per victim as well as collective reparations in the form of support for housing, support for income-generating activities, education aid and psychological support. While reparations were ultimately not adopted in the *Bemba* case, a group of experts recommended to the Trial Chamber a mixture of individual and collective forms of reparations. They prioritised lifetime access to anti-retroviral medication and food for victims of rape that had contracted HIV-AIDS, and a standard

---

<sup>61</sup> Luke Moffett, 'Meaningful and Effective? Considering Victims' Interests Through Participation at the International Criminal Court' (2015) 26(2) *Criminal Law Forum* 255.

<sup>62</sup> *Katanga* reparations order (n 23).

<sup>63</sup> *Al Mahdi* reparations order (n 24).

<sup>64</sup> The *Al Mahdi* Reparations Order is analysed in Francesca Capone, 'An Appraisal of the *Al Mahdi* Order on Reparations and Its Innovative Elements: Redress for Victims of Crimes against Cultural Heritage' (2018) 16(3) *J Intl Criminal J* 645.

<sup>65</sup> *Katanga* reparations order (n 23). The Trial Chamber indicates: 'it is paramount, in the Chamber's view, to heed the expectations and needs voiced by the victims in the various consultation exercises' [para. 266].

reparations package consisting of a fixed compensation amount, an amount for sustainable livelihood assistance, for investing in a ‘kelemba’ – a type of micro-credit/savings system as well as an amount for moral damage. It was recommended that whether symbolic forms of reparations should be ordered and what they might entail should be revisited after material reparations were designed and delivered.<sup>66</sup>

### 3. The Trust Fund for Victims

Article 79 of the ICC Statute indicates that ‘[a] Trust Fund shall be established by decision of the Assembly of States Parties for the benefit of victims of crimes within the jurisdiction of the Court, and of the families of such victims.’

Article 75 of the ICC Statute refers to the possibility for the Court to ‘order that the award for reparations be made through the Trust Fund’,<sup>67</sup> and Rule 98 of the Rules of Procedure and Evidence explains the modalities for using the Trust Fund to allocate or distribute the reparations awards made by the Court to victims. Rule 98 explains the two principle roles of the Trust Fund: implementing reparations orders emanating from the Court and providing broader forms of assistance to victims and their families. These roles are further clarified in the Regulations of the Trust Fund.<sup>68</sup>

#### a. Implementing orders from the Court

---

<sup>66</sup> Bemba expert report (n 42).

<sup>67</sup> Article 75(2).

<sup>68</sup> Resolution ICC-ASP/4/Res.3, adopted by the Assembly of States Parties on 3 December 2005.

The Trust Fund is mandated to implement orders for reparation coming from the Court, when the Court requests it to do so. Rule 98, paragraph 2 provides that the Court may order that awards for reparations against a convicted person be deposited with the Trust Fund where at the time of making the order it is impossible or impracticable to make individual awards directly to each victim, whereas paragraphs 3 and 4 provide that awards for reparations be made through the Trust Fund, ‘where the number of the victims and the scope, forms and modalities of reparations makes a collective award more appropriate,’ or when made ‘to an intergovernmental, international or national organization approved by the Trust Fund.’

In practice, the implementation of Court-ordered reparations has not been smooth. The Trust Fund has been slow to come to grips with this work, which require a different skill set to its assistance work, more interaction with chambers and much less autonomy. Connected to this is some tension about authority and independence, and the control of the Trust Fund’s voluntary resources. It is clear that the Trust Fund operates within the context of the Court and in service of the overall reparative mandate of the ICC. Yet, the Trust Fund has discretion to determine how it uses the voluntary funds it collects.<sup>69</sup> This discretion however, does not mean that it is simply a possible ‘implementing partner of the Court’<sup>70</sup>; it is formally mandated to implement the Court’s reparations orders.<sup>71</sup> The Trust Fund is not empowered to reject the task of implementing the Court’s orders though it does control the use of its voluntary resources. Should it choose, the Trust Fund for Victims can apply a portion of its voluntary resources towards the implementation of a

---

<sup>69</sup> Trust Fund regulations, 56.

<sup>70</sup> The Trust Fund for Victims made this argument in *The Prosecutor v. Thomas Lubanga Dyilo*, ‘First submission of victim dossiers’, ICC-01/04-01/06-3208, 31 May 2016, (“Lubanga, First submission of victim dossiers”) para. 170.

<sup>71</sup> In an early decision, the position of the chamber was that the Trust Fund was obligated to set aside voluntary resources for the implementation of Court-ordered reparations: ‘[...] the responsibility of the Trust Fund is first and foremost to ensure that sufficient funds are available in the eventuality of a Court reparation order pursuant to Article 75 of the Statute.’ See, *The Prosecutor v. Thomas Lubanga Dyilo*, ‘Decision on the Notification of the Board of Directors of the Trust Fund for Victims in accordance with Regulation 50 of the Regulations of the Trust Fund’, ICC-01/04-492, 11 April 2008, p. 7.

reparations award against an indigent convicted perpetrator; however the Court does not have the power to oblige the Trust Fund for Victims to apply its voluntary resources in this way.<sup>72</sup> This nuance of roles and responsibilities could have been better managed.

Also, various chambers have taken issue with the draft implementation plans prepared by the Trust Fund in response to reparations orders. Particularly in the *Lubanga* and *Al Mahdi* cases, there has been a robust back and forth between the relevant chambers and the Trust Fund - the various chambers admonishing the Trust Fund for the lack of specificity of draft implementation plans, extensive delays or the failure to comply fully with Court orders,<sup>73</sup> noting with overt frustration that ‘it is crucial for the TFV to act with due diligence in making judicial findings’, and that ‘these repeated failures to comply with the most basic requirements of a Chamber’s order suggest that the TFV has not yet gained command of its own mandate when operating within the judicial process.’<sup>74</sup> In contrast, the Trust Fund has argued that the orders are impossible or overly burdensome to comply with, particularly on issues such as verification of individual beneficiaries.<sup>75</sup> For instance, the Trust Fund has expressed deep concern about the *Lubanga* chambers’ approach to implementing collective reparations which ‘would be operationally and financially impossible for either the Trust Fund (or the Court) to manage and in addition would be very time consuming, further delaying the implementation of reparations.’<sup>76</sup>

---

<sup>72</sup> *Lubanga Reparations Appeal* (n 17), paras. 111-114.

<sup>73</sup> See, e.g., *The Prosecutor v. Thomas Lubanga Dyilo*, ‘Order instructing the Trust Fund for Victims to supplement the draft implementation plan’, ICC-01/04-01/06-3198-tENG, 9 February 2016, para. 20; *Lubanga*, First submission of victim dossiers (n 70), paras. 8-9; *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, ‘Public Redacted Version of “Decision on Trust Fund for Victims’ Draft Implementation Plan for Reparations” 12 July 2018’, ICC-01/12-01/15-273-Red, 12 July 2018, paras. 9-22.

<sup>74</sup> *Al Mahdi* case, *ibid*, paras. 9, 14.

<sup>75</sup> *The Prosecutor v. Thomas Lubanga Dyilo*, ‘Request for Leave to Appeal against the “Ordonnance enjoignant au Fonds au profit des victimes de compléter le projet de plan de mise en œuvre” (9 February 2016)’ ICC-01/04-01/06-3200, 15 February 2016.

<sup>76</sup> *Lubanga*, First submission of victim dossiers (n 70), para. 169.

These battles of wills have contributed to the delay in the implementation of reparations orders, causing frustration and a sense of abandonment among victims.<sup>77</sup> In the *Lubanga* case, one DRC organization assisting victims wrote to the Court in 2016, ‘It is obvious that the victims are tired of multiple interviews with NGOs and members of various services of the Court, without all this having brought results to date satisfying their expectations of reparation. They do not know what meaning to give to all these procedures which seem to them "endless".’<sup>78</sup>

Over time, however, there appears to have developed a greater mutual understanding of roles and responsibilities. Also, the Trust Fund has progressively sought to collaborate on victim identification with the other bodies in the Court with relevant knowledge and experience in engaging victims - the VPRS, the Outreach section, and the Legal Representatives.<sup>79</sup> In March 2019, Trial Chamber VIII overseeing the implementation of the *Al Mahdi* reparations order noted that:

the Chamber must recall that in the proceedings which preceded the DIP [Draft Implementation Plan] Decision it had frequent occasion to admonish the TFV for lack of diligence. The Chamber wishes to take this opportunity to commend the TFV for what is by all accounts a marked improvement in the UIP [Updated Implementation Plan]. The proposals are described in considerable detail, the relevant figures are explained and the document was submitted on time. The TFV’s efforts exemplify the high standard expected of them going forward.<sup>80</sup>

---

<sup>77</sup> The Prosecutor v Germain Katanga, ‘*Communication du Représentant légal relative aux vues et préoccupations des victimes bénéficiaires de réparation*’, ICC-01/04-01/07-3819-Red, 17 December 2018, para. 22.

<sup>78</sup> The Prosecutor v Thomas Lubanga Dyilo, ‘*Observations de la Ligue pour la Paix, les Droits de l’Homme et la Justice (LIPADHOJ) présentées conformément à l’ordonnance de la Chambre de céans du 15 juillet 2016 rendue en application de la règle 103 du règlement de procédure et de preuve*’, ICC-01/04-01/06-3232, 29 September 2016, para. 25 (unofficial translation).

<sup>79</sup> This is explained in The Prosecutor v Thomas Lubanga Dyilo, ‘*Observations in relation to the victim identification and screening process pursuant to the Trial Chamber’s order of 25 January 2018*’, ICC-01/04-01/06-3398, 21 March 2018.

<sup>80</sup> The Prosecutor v. Ahmad Al Faqi Al Mahdi, ‘*Decision on the Updated Implementation Plan from the Trust Fund for Victims*’, ICC-01/12-01/15-324-Red, 4 March 2019, para. 22.

Nevertheless, none of the cases that have reached the reparations implementation stage have been fully implemented. This is a problem.

#### b. Implementing the assistance mandate

In addition to its role to implement reparations orders when requested to do so by the Court, the Trust Fund can provide general assistance to victims and affected communities, using voluntary resources it collects.<sup>81</sup> This possibility was intended to help avoid the situation of victims who required urgent assistance having to wait, sometimes for more than a decade, until the conclusion of a case, and also, to take into account the fact that Court-ordered reparations may not reach all victims in a particular situation.<sup>82</sup>

In practise, the Trust Fund's assistance has been an important way to get a modicum of support to victims. The assistance projects have, on the whole, been well-received where they have occurred. The challenges lie elsewhere.

First, the Trust Fund's activities have been relatively small-scale given the limited funds it has had access to do date. There is an obvious question about economies of scale; whether other development actors with access to much more significant pools of resources would be better placed to service the needs of victims in the communities where the Trust Fund operates.<sup>83</sup> The Trust Fund has argued that its' victim-centred approach is unique and in addition to identifying gaps that

---

<sup>81</sup> Rule 98(5), Rules of Procedure and Evidence. See generally, Anne Dutton and Fionnuala Ní Aoláin, 'Between Reparations and Repair: Assessing the Work of the ICC Trust Fund for Victims Under Its Assistance Mandate', (2019) 19(2) *Chicago J Intl L* 490.

<sup>82</sup> Peter Dixon, 'Reparations, Assistance and the Experience of Justice: Lessons from Columbia and the DRC', (2016) 10 *Intl J Transitional J* 88, 104.

<sup>83</sup> REDRESS (2019) (n 38), 31.

need filling, it plays a catalytic role both in signposting the needs of victims in particular communities, bringing greater attention to those needs and helping those needs to be met – by its own funds, by the partnerships it fosters, and by others coming in to sustain the work.<sup>84</sup> This is a particularly important role and when done successfully, a good way to make the Trust Fund's interventions sustainable.

Second, the Trust Fund has not been active in all situation countries. In principle, its mandate would allow it to provide support to natural persons and their families who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court, or organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.<sup>85</sup> This would include the following countries, all of which involve situations under investigation by the Prosecutor: Burundi, Georgia, Central African Republic, Mali, Cote d'Ivoire, Libya, Kenya, Darfur (Sudan), Uganda and DRC.<sup>86</sup> The Trust Fund has been active in providing assistance in DRC and Uganda, and has indicated its intention to provide support in Cote d'Ivoire and Central African Republic. The Trust Fund announced its intention to speed up the launch of its assistance programmes in the Central African Republic following the acquittal of Jean-Pierre Bemba Gombo,<sup>87</sup> though at the time of writing more than one year later, programmes of assistance did not

---

<sup>84</sup> See e.g., Trust Fund for Victims, 'Learning from the TFV's Second Mandate: From Implementing Rehabilitation Assistance to Reparations', 2010.

<sup>85</sup> Rule 85 and 98(5) of the Rules of Procedure and Evidence, read together with Regulations 48 and 50(a) of the Regulations of the Trust Fund for Victims.

<sup>86</sup> For an updated list of 'situation countries', see the ICC website, <https://www.icc-cpi.int/Pages/Situations.aspx> (accessed July 2019).

<sup>87</sup> See the Statement from the Trust Fund for Victims' Board of Directors, 'Following Mr Bemba's acquittal, Trust Fund for Victims at the ICC decides to accelerate launch of assistance programme in Central African Republic', Press Release, 13 June 2018. See also the Communication from the Chair of the Board of Directors of the Trust Fund for Victims to the President of the Assembly of States Parties, 13 June 2018.



appear to be close to starting. The security situation and limited funding are important barriers, however, transparency is also a problem. It is not always clear why assistance programmes have been started in some countries and not others. The discretion of the Trust Fund appears limitless and impossible for victims to challenge. This has angered many victims who have been unable to access support.<sup>88</sup>

Third, an important part of the purpose of the assistance mandate as originally conceived was to ensure benefits for some of the most vulnerable victims with urgent needs that could not wait for the conclusion of a lengthy trial. The Trust Fund regulations require the Board of the Trust Fund to notify the Court before embarking on any activity or project to provide physical or psychological rehabilitation or material support for the benefit of victims and their families, in order to provide the Court with an opportunity to inform the Board if a particular project or activity would pre-determine any issue to be determined by the Court or be prejudicial to or inconsistent with the rights of the accused and a fair and impartial trial.<sup>89</sup> In order to avoid any perception of prejudice, however, the Trust Fund has given an extra wide berth to the Court and has avoided undertaking activity that addresses the needs of victims affected by ongoing Court proceedings. It has argued in one of its filings that: ‘assistance activities under the regulatory framework are prohibited from being related to a case, interfering with a case against an accused or with a legal issue in a case. Under the Court’s legal framework, assistance activities carried out under regulation 50 (a) of the Regulations of the Trust Fund cannot be associated with a case at the pre-trial stage or while the trial proceedings are on-going. In the Trust Fund’s view, while the issue

---

<sup>88</sup> See, e.g., ‘ICC Trust Fund for Victims to Visit Kenya: Prospect of aid is welcomed, but those who suffered wonder why it has taken so long to begin assessing their needs’ IWPR, 26 June 2014; The Prosecutor v. Uhuru Muigai Kenyatta, ‘Victims’ response to the ‘Prosecution’s notice of withdrawal of the charges against Uhuru Muigai Kenyatta’, ICC-01/09-02/11-984, 9 December 2014.

<sup>89</sup> Regulation 50(a), Regulations of the Trust Fund for Victims.

has not yet been litigated before the Court, its assistance activities should also not, as a matter of policy, relate to any specific case at the post-conviction stage.’<sup>90</sup> This, which goes well beyond the Rules of Procedure and Evidence and the Trust Fund’s own regulations, produces the odd situation that if a Prosecutor decides to focus in on offences in village X, or particular crimes perpetrated by perpetrator Y, because of the gravity of those incidents and other related reasons, the Trust Fund would purposefully avoid providing assistance to the victims of those crimes, opting to support victims in other places, or of other crimes one step removed from the Prosecutor’s investigations. This policy choice arguably avoids all risk of potential prejudice,<sup>91</sup> however it defeats one of the main purposes of the assistance mandate – to ensure victims get the support they need while waiting for the trials to conclude. As REDRESS has noted, ‘[w]hile the Trust Fund’s decision to commence its assistance mandate in CAR is generally applauded, concern has been expressed that it could have acted more proactively to mitigate the suffering of CAR victims pending a final determination on reparations.’<sup>92</sup> Sehmi has argued similarly that ‘[i]t is not a morally supportable outcome that participating victims [like Ben] die waiting for justice because of concerns that providing urgent medical assistance would violate the presumption of innocence. There is a clear distinction between urgent assistance and court ordered reparations. Assistance includes a broad range of measures, such as medical assistance, housing etc., that are aimed at addressing the immediate needs of victims of mass atrocities in the aftermath of conflict.’<sup>93</sup> While it is possible to imagine that there might be circumstances in which a grant of assistance might lead to real or perceived prejudice, those circumstances would be atypical. It is not appropriate or

---

<sup>90</sup> The Prosecutor v. Thomas Lubanga Dyilo, ‘Additional Programme Information Filing’, ICC-01/04-01/06-3209, 7 June 2016, para. 75.

<sup>91</sup> See Dixon (n 82).

<sup>92</sup> REDRESS (2019) (n 38).

<sup>93</sup> Anushka Sehmi, “‘Now that we have no voice, what will happen to us?’: Experiences of Victim Participation in the Kenyatta Case”, (2018) 16 *J Intl Crim J* 571, 586

necessary for the Trust Fund to discriminate against an entire, obviously relevant, category of persons requiring urgent assistance in order to avoid potential differences with chambers of the Court.

### *E. The Need to Improve Effectiveness: Some Reflections*

#### *1. The Meaning of Effectiveness*

Effectiveness has a plain-meaning and also a meaning in human rights law. The European Court of Human Rights has used the term to better understand the different positive obligations under the European Convention, intended to guarantee rights that are not theoretical or illusory, but practical and effective.<sup>94</sup> Many treaties recognise the right to an “effective remedy” for persons whose rights have been violated, which encompasses a variety of concepts including the right to a fair trial and the right to have access to court.<sup>95</sup> Reparation is an important component of an effective remedy; ‘Without reparation to individuals whose Covenant rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged.’<sup>96</sup> An excessive length of proceedings has on occasion been determined to justify a finding of an absence of an effective remedy.<sup>97</sup>

---

<sup>94</sup> See, *Airey v. Ireland*, Appl no. 6289/73, 9 October 1979, para. 24; *Artico v. Italy*, Appl no. 6694/74, 13 May 1980, para. 33.

<sup>95</sup> See, e.g., Article 2(3) of the International Covenant on Civil and Political Rights; Article 14 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women. For an explanation of the content of an effective remedy, see, UN Human Rights Committee, ‘General Comment 31’, Nature of the General Legal Obligation Imposed on States Parties to the ICCPR, UN Doc CCPR/C/21/Rev.1/Add.13, 26 May 2004, paras. 15-20.

<sup>96</sup> General Comment 31, *ibid*, para. 16.

<sup>97</sup> *Pizzati v. Italy*, Appl. no. 62361/00. 10 November 2004 (referred to GC on other issues).

The plain meaning of ‘effectiveness’ denotes the degree to which particular objectives are achieved, behaviours are changed and the extent to which targeted problems are managed and solved; the capacity to do or deliver what is supposed to be done or delivered.<sup>98</sup> In organizational sciences, it has been argued that ‘relationships between structure and environment, design and innovation, or adaptation and uncertainty, for example, are important because their results lead ultimately to organizational effectiveness’.<sup>99</sup> Thus, effectiveness should be judged not only on the innovations of structure, but on the capacity of an institution to adapt to meet challenges.

Having in mind the need to improve effectiveness, the ICC Assembly of States Parties invited the Court to ‘intensify its efforts to enhance the efficiency and effectiveness of proceedings including by adopting further changes of practice’ and ‘request[ed] the Court to intensify its efforts to develop qualitative and quantitative indicators that would allow the Court to demonstrate better its achievements and needs...’.<sup>100</sup> The Court has begun to develop indicators to track its work,<sup>101</sup> though to date, there has been only limited consideration of what would constitute effective reparations. Consequently, the concept remains malleable and changeable depending on the perspectives of those carrying out the assessment, as is explained in the next section.

## *2. Three frames of reference which underscore the complexity of perspectives on effectiveness*

---

<sup>98</sup> Marc Levy, Oran Young and Michael Zürn, ‘The Study of International Regimes’, (1995) 1(3) *Eur J Intl Rel* 267, 290-91.

<sup>99</sup> See, Kim Cameron, ‘Effectiveness as Paradox: Consensus and Conflict in Conceptions of Organizational Effectiveness’, (1986) 32(5) *Organization Design* 539, 540.

<sup>100</sup> ‘Strengthening the International Criminal Court and the Assembly of States Parties’, ICC-ASP/13/Res.5, 17 December 2014, Annex I, para. 7.

<sup>101</sup> ICC, ‘Report of the Court on the development of performance indicators for the ICC’, 12 November 2015. See also, ICC, ‘Third Court’s report on the development of performance indicators for the International Criminal Court’, 15 November 2017.

The ICC reparations regime is effective if it is capable of achieving its purpose within an appropriate time span. In a very basic sense the purpose of reparations before the ICC is to redress the harm suffered by victims of crimes within the jurisdiction of the Court. However, judgments of effectiveness are ‘based on the values and preferences individuals hold for a certain organization. The trouble with these values and preferences, however, is that they vary, and they are often contradictory among different constituencies.’<sup>102</sup>

The effectiveness of ICC reparations can be understood through several frames of reference, in some combination:

- i) *procedural or process matters*: how lengthy, cumbersome is the process and how do the various persons involved in or affected by proceedings (including victims) experience the process including those with special needs or requirements;
- ii) *substantive matters*: whether reparations awards are targeted at appropriate and relevant persons and/or groups; whether the awards address the harms suffered by victims, were appropriate to the context and served their intended purposes; and
- iii) *wider goals*: whether reparations address the wider objectives under the ICC Statute including its preamble, contribute to victims’ transformation, reconcile communities and promote non-repetition.

---

<sup>102</sup> Cameron (n 99), 541.

Clearly these are simplified versions of more complex positions. Nevertheless, the three perspectives can help explain why and how different reparative visions impact on effectiveness and why it remains challenging to chart a common path forward.

For some, questions of effectiveness should be assessed from the first perspective, sometimes with added criteria relating to costs. Some within this “camp” are likely to see reparations as important though secondary to the prosecutorial mandate of the Court; reparations are fine as an objective so long as they can be contained and do not detract from the primary mandate.<sup>103</sup> Given the huge needs of victims, reparations could focus on more symbolic measures, which may acknowledge victims’ rights and needs but serve mainly as a catalyst for other actors to step in. Or, collective reparations could be privileged because they are perceived as simpler to implement, thus more efficient and also notionally capable of reaching a wider class of victims. Victims’ preferences are to be acknowledged but to some, they will be secondary to efficiency considerations.<sup>104</sup> The beneficiary class could be limited to persons who submitted prior applications because it would cause too much delay to open the process to unidentified victims.<sup>105</sup> To others, victims’ experiences of the reparations process - particularly the need for victims’ voices to be heard, their priorities reflected and for the process to be expeditious - are crucial to this first frame of reference.<sup>106</sup>

---

<sup>103</sup> Van den Wyngaert (n 12).

<sup>104</sup> See, e.g., The Prosecutor v. Germain Katanga, ‘Notification pursuant to regulation 56 of the TFC Regulations regarding the Trust Fund Board of Directors’ decision relevant to complementing the payment of the individual and collective reparations awards as requested by Trial Chamber II in its 24 March 2017 order for reparations’, ICC-01/04-01/07-3740, 17 May 2017. The Trust Fund had agreed to use its voluntary resources to support the implementation of the collective aspect of the Katanga award. Ultimately, it also supported the implementation of the individualised reparations awards because it received an earmarked grant from The Netherlands to do so. See, Juan Pablo Pérez-León-Acevedo, ‘The Katanga Reparation Order at the International Criminal Court: Developing the Emerging Reparation Practice of the Court’, (2018) 36(1) *Nordic J Hum Rts* 91, 100.

<sup>105</sup> Bemba expert report (n 42), paras. 41 – 51.

<sup>106</sup> The Prosecutor v. Germain Katanga, ‘Observations of the victims on the principles and procedures to be applied to reparations’, ICC-01/04-01/07-3555-tENG, 15 May 2015, para 12.

For others, effectiveness should be assessed by both first and second frames of reference and the second frame will be narrowly focussed on the victims of crimes for which the perpetrator was convicted. There may be differences of perspective regarding how closely connected victims' harms must be to the crimes, but essentially, there is an acceptance of the view that reparations is intended for victims of the crimes for which a perpetrator was convicted.<sup>107</sup> Reparations should focus on what is appropriate to address the actual harm suffered by victims, and not be guided primarily by expediency.<sup>108</sup> The victims' legal representatives in the *Katanga* case underscore this point, arguing for practical measures closely connected to what the victims want and need:

The victims have clearly stated what they are expecting in terms of reparations. Their expectations correspond to the distress that they have been enduring, which stems directly from the harm they suffered as a result of the crimes of which G. Katanga has been convicted. They are aware that full reparations for the harm they have suffered would probably be difficult to achieve, not only with regard to the nature of the harm suffered but also owing to budgetary constraints. The victims of the attack on Bogoro of 24 February 2003 need to be able to reconstruct and, in most cases, recover a decent standard of living. In the present case, the objectives of the reparation must be to enable the victims to ease the suffering caused by the attack. In order to give the reparations meaning and to spare the victims further frustration, the Chamber must draw a clear distinction between what it must order judicially in terms of reparations for the victims of the case and what it could recommend extrajudicially for other categories of victims or affected communities, if this is to be the case. Lastly, the Legal Representative wishes to recall that the victims in Katanga stated nonetheless that, should reparations ever be awarded to "[TRANSLATION] victims in general", their tormentors could also become beneficiaries. Such a situation would prejudice the very objective of reparations.<sup>109</sup>

---

<sup>107</sup> Lubanga Reparations Appeal (n 17).

<sup>108</sup> ICTJ makes this point in its submission on the Lubanga reparations award: it is 'important not to reflexively respond to unrealistic expectations about individual reparations by either proposing the concept of "collective reparations" as a default approach or by proposing the payment of a lump sum of money that makes no distinctions among victims' experiences and needs,' and 'we respectfully submit that the Court ought not to base its reparations orders, whether directly against the convicted person or through the TFV, on the number and circumstances of those victims whose applications for participation and reparations have been admitted, or even on the number of those who might apply within an initial period for applications that the Court might set. It will likely be more effective for the Court (or the TFV) to maintain an 'open' list of applicants, to conduct a series of registration phases periods, and to retain the flexibility to adjust awards for reparations on the basis of mapping and needs-assessment results'. [The Prosecutor v. Thomas Lubanga Dyilo, 'Submission on reparations issues', ICC-01/04-01/06-2879, 10 May 2012, paras. 18 and 29].

<sup>109</sup> The Prosecutor v. Germain Katanga, 'Observations of the victims on the principles and procedures to be applied to reparations', ICC-01/04-01/07-3555-tENG, 15 May 2015, paras. 26-30.

For others, the second frame of reference should be broadened to consider a wider constellation of victims connected to the crimes, not solely those that have sought to interact with the Court. For some, this will be a question of allowing for a wider causal link between the crimes for which the perpetrator was convicted and the harm suffered by victims.<sup>110</sup> For instance, the Women's Initiatives for Gender Justice submitted that:

Rape was an integral component of the conscription process for girl soldiers and sexual violence constituted an integral component to the crimes for which Mr Lubanga has been convicted. As such, reparations should not be limited to a narrow assessment of the harms attached to the charges, but should be inclusive of the breadth of harm suffered as a result of these crimes.<sup>111</sup>

The third frame for some will be important but not directly relevant to any assessment of effectiveness (an added bonus of reparations but not the purpose of the ICC's reparative mandate), whereas for others, the third frame is by far the most relevant reference. For instance, the Trust Fund, in some of its submissions, has focused on the importance of the reparative goals of reconciliation, satisfaction and guarantees of non-repetition.<sup>112</sup>

*b. The Court's approach to effectiveness – where next*

Unsurprisingly, the Court has vacillated in its approach. Certain chambers have focused on the first frame of reference, and with time have mainly adopted a narrow vision of the second frame. Some chambers have incorporated into their discourse aspects of the third frame, though mainly to articulate broad principles, less so in the adoption of reparations orders and the approval of draft

---

<sup>110</sup> The first Trial Chamber reparations order in the *Lubanga* case understood that gender harm should be covered, Lubanga First Reparations Decision on Principles and Procedures (n 34).

<sup>111</sup> The Prosecutor v. Thomas Lubanga Dyilo, 'Observations of the Women's Initiatives for Gender Justice on Reparations', ICC-01/04-01/06-2876, 10 May 2012, para 37.

<sup>112</sup> See, e.g., Lubanga case: Trust Fund First Report on Reparations (n 18).



implementation plans. An exception perhaps is the *Al Mahdi* case, where the chamber included the objective of non-repetition into its reparation order.<sup>113</sup>

The fact that there are so many perspectives on the goals of the reparations process and consequently, the benchmarks for effectiveness, underscores why a meeting of the minds has been difficult to achieve.

### *3. Article 21(3) of the Statute as a gauge for effectiveness*

Article 21(3) of the ICC Statute provides:

The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

This provision requires the Court to interpret law consistently with internationally recognised human rights. In this section, it is argued that human rights should not only serve as the lens through which the ICC Statute and other applicable laws are applied and interpreted, it should also guide the ICC in its relationships with stakeholders (including victims) and help determine its goals and policies, particularly in relation to reparations.

While important, it is unclear whether Article 21 requires the ICC *qua* institution, including its various organs, to respect the human rights of those persons impacted by its actions. The ICC is not a party to human rights treaties and thus it has not agreed to be bound by human rights provisions in the classic sense. Nevertheless, this does not prevent it from recognising that its

---

<sup>113</sup> Al Mahdi reparations order (n 24), paras. 60-67.

mandate has a direct impact on individuals' human rights, and how it treats individuals in its charge is central to questions about the effectiveness of its work.

Human rights is an increasingly important lens through which the work of international organisations can be assessed.<sup>114</sup> In particular, institutions have been called upon to introduce or improve “due process” procedures to address perceived human rights deficiencies. For example, in a study commissioned by the UN Office of Legal Affairs relating to the individual sanctions regime of the UN Security Council, Professor Bardo Fassbender noted that ‘there is a legitimate expectation that the UN, through its organs, observes standards of due process, or “fair and clear procedures” on which the person concerned can rely.’<sup>115</sup> He notes further that ‘[d]ependent on the circumstances of a particular situation, appropriate standards must be determined, suited to that situation, paying due regard to the nature of the affected rights and freedoms and the extent to which action taken by the UN is likely adversely to affect those rights and freedoms.’<sup>116</sup> Similarly, in response to the perceived deficiencies of the UN response to allegations of sexual exploitation and abuse by international peacekeeping forces in Central African Republic, the group of experts appointed to carry out an independent review recommended that the UN adopt a human rights centred policy framework to address conflict related sexual violence by peacekeepers: ‘This shift in approach has important implications for the manner in which the UN responds to the needs of victims and conceives of its obligation to report, investigate and follow up on allegations.’<sup>117</sup>

---

<sup>114</sup> See generally, Carla Ferstman, *International Organizations and the Fight for Accountability: The Remedies and Reparations Gap* (Oxford University Press, 2017).

<sup>115</sup> Reproduced in Bardo Fassbender, ‘Targeted Sanctions Imposed by the UN Security Council and Due Process Rights: A Study Commissioned by the UN Office of Legal Affairs and Follow-up Action by the United Nations’ (2006) 3 *Intl Org LR* 437, para 6.6

<sup>116</sup> *ibid*, para 10.

<sup>117</sup> Marie Deschamps, Hassan Jallow and Yasmin Sooka, ‘Taking Action on Sexual Exploitation and Abuse by Peacekeepers: Report of an Independent Review on Sexual Exploitation and Abuse by International Peacekeeping Forces in the Central African Republic’, 17 December 2015, 79.

International criminal courts and tribunals including the ICC, have long recognised the need for their procedures to respect the rights of the accused. The UN Secretary-General has stated that it 'is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings.'<sup>118</sup> Recognised defence rights include the presumption of innocence, the right to know the charges, have the assistance of counsel, challenge the Prosecution evidence, present defence evidence, understand the proceedings and evidence, and remain silent, among other rights.<sup>119</sup>

There is less clarity about the obligations of the ICC to uphold victims' rights, including victims' right to an effective remedy. Article 64(2) of the ICC Statute makes the distinction between the treatment of defence and victims' rights, clear: 'The Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with *full respect for the rights of the accused and due regard for the protection of victims and witnesses* (emphasis added).' It is recognised that victims and witnesses must be protected, but they are not recognised as rights holders in the same sense as accused persons; victims have certain procedural rights to participate and claim reparations, but the wider human rights that they might benefit from under domestic law or pursuant to human rights treaties, are not recognised specifically.

Thus far, respect for human rights has not been included as part of the performance indicators developed by the Court.<sup>120</sup> Nevertheless, it is argued that human rights is a crucial

---

<sup>118</sup> UN Secretary-General's Report on Aspects of Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia, UN Doc S/25704, 3 May 1993, para. 106.

<sup>119</sup> See e.g., ICC Statute, articles 64, 66 and 67. See, Guido Acquaviva 'Human Rights Violations before International Tribunals: Reflections on Responsibility of International Organizations' (2007) 20(3) *Leiden J Intl L* 613; Lorenzo Gradoni, 'The Human Rights Dimension of International Criminal Procedure', in *International Criminal Procedure: Principles and Rules*, G. Sluiter et al (eds), (Oxford University Press, 2013), 74-80.

<sup>120</sup> ICC, 'Report of the Court on the development of performance indicators for the ICC', 12 November 2015. See also, ICC, 'Third Court's report on the development of performance indicators for the ICC', 15 November 2017.

indicator of effectiveness. Not only is recognising the inherent dignity and rights of all those who are affected by its work important in itself, it is also a clearer, less variable and arguably more neutral lens through which to observe the Court's work and its reparations framework.

Most relevant to victims' rights before the ICC, under human rights law, there is an obligation on States to investigate and prosecute the most serious human rights abuses which constitute crimes under international law<sup>121</sup> and victims are recognised to have a variety of procedural rights during the investigation and subsequently, such as the right to file a complaint, the right to receive information about the follow-up of the complaint, the right to some kind of administrative or judicial review upon a decision not to pursue an investigation or prosecution.<sup>122</sup> Victims and their families also have the right to know the truth about the abuses they suffered, including the identity of perpetrators and the causes that gave rise to the violations.<sup>123</sup>

*a. Key human rights principles relevant to the effectiveness of reparations before the ICC*

*i. Timeliness of reparations*

To promote efficiency and effectiveness, the ICC should put in place measures to ensure a speedy trial – not only to guarantee defence rights, but also in recognition of victims' right to an effective

---

<sup>121</sup> This obligation is reflected in a range of treaties and conventions, including the Genocide Convention, the Geneva Conventions 1949 (grave breaches provisions), the UN Convention Against Torture, the Convention Against Enforced Disappearances, and has been reflected in numerous judicial decisions.

<sup>122</sup> See generally, REDRESS and Institute for Security Studies, 'Victim Participation in Criminal Law Proceedings: Survey of Domestic Practice for Application to International Crimes Prosecutions' September 2015.

<sup>123</sup> See, e.g., UN Human Rights Commission, Human Rights Resolution 9/11, 'Right to the truth', UN Doc. A/HRC/RES/9/11, 24 September 2008; *Velásquez Rodríguez v Honduras*, Ser. C No. 4, 29 July 1988; *Al Nashiri v Poland*, App. No. 28761/2011, 24 July 2014, paras. 494-95.

remedy without delay, including reparations.<sup>124</sup> In *Ivanov v. Ukraine*, which concerned the failure to enforce in a timely way a lump-sum retirement payment and compensation award, the ECtHR determined that the right to court would be illusory if Ukraine allowed a final, binding judicial decision to remain inoperative to the detriment of one party. ‘The effective access to court includes the right to have a court decision enforced without undue delay.’ How long a delay is too long depends on ‘the applicant’s own behaviour and that of the competent authorities, and the amount and nature of the court award.’<sup>125</sup>

Under a human rights performance framework, reparations would be ineffective if implementation was unduly delayed. This would change the narrative in an important way. It is not just ‘unfortunate’ that the process is taking so long; it would be a breach of the Court’s commitment to ensure victims’ rights and the Court would be required to take adequate steps to rectify the breach – there is an obligation to make the process work for victims.

ii. *Victims’ ability to express views and concerns about reparations, and for these to be taken into account*

Surely, under Article 68(3) of the ICC Statute, victims can participate in proceedings that affect them, including reparations proceedings. However, engagement in reparations proceedings involves not only the ability to input into legal proceedings but to engage effectively with those

---

<sup>124</sup> The UN Committee Against Torture refers to the need for ‘timely and effective redress mechanisms’. UN Committee Against Torture, ‘General comment No. 3: Implementation of article 14 by States parties’, UN Doc CAT/C/GC/3, 13 December 2012, para. 39

<sup>125</sup> *Yuriy Nikolayevich Ivanov v. Ukraine*, Appl. no. 40450/04, 15 October 2009, para. 51.

developing and implementing reparations and assistance programmes.<sup>126</sup> This requires two-way discussions and a need for those in the Court and the Trust Fund to be accountable to victims for the decisions they take. The Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparations underscores the need for consultation and engagement with victims throughout the reparations process; this is about recognising victims' agency and supporting their empowerment: 'Processes must empower women and girls, or those acting in the best interests of girls, to determine for themselves what forms of reparation are best suited to their situation. ... Full participation of women and girls victims should be guaranteed in every stage of the reparation process, i.e. design, implementation, evaluation, and decision-making.'<sup>127</sup>

iii. *The process should be conducted in such a way so as to guarantee the dignity, security and privacy of victims.*

Victims must be treated with humanity and dignity<sup>128</sup> and their privacy and safety, both physical and psychological, must be safeguarded.<sup>129</sup> The connection between excessive length of reparations proceedings and the need to treat victims with humanity and dignity must be underscored.

---

<sup>126</sup> 'Updated Set of Principles for the protection and promotion of human rights through action to combat impunity', UN Doc E/CN.4/2005/102 (2005), Principle 32. On the importance of victim participation throughout reparations proceedings, see the chapter by Correa, Guillerot and Magarrell in this volume.

<sup>127</sup> Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation (International Meeting on Women's and Girls' Right to a Remedy and Reparation, Nairobi, 19-21 March 2007, Principles 1(d); 2(b).

<sup>128</sup> General Comment 31 (n 95) para. 15; Basic Principles and Guidelines (n 48) 12(c).

<sup>129</sup> Basic Principles and Guidelines (n 48) 10, 12(b).

iv. *Reparations awards should as far as possible, address the particular harms suffered by victims. They should be adequate and effective.*

Human rights treaties recognise that reparations should be fair, adequate or effective, used either singly or grouped together appropriate, proportionate to the harm and equitable.<sup>130</sup> More simplified approaches tend to be taken when there is a large number of injured individuals who would be entitled to significant reparation that would be overwhelming for a court to adjudicate claim by claim, and/or when the nature of the violations is such that victims would not have the requisite proof to satisfy a court of their injuries using typical standards of proof.<sup>131</sup> Nevertheless, simplified procedures should to the greatest possible extent, seek to address the particular harms suffered by victims.

ICC chambers have incorporated many of these concepts into reparations principles they have adopted in particular cases, however the degree to which the awards meet these objectives – key indicators of effectiveness – is not tracked by performance indicators, nor necessarily in the draft implementation plans prepared by the Trust Fund. Instead, the Court and Trust Fund appear in some instances to have relied on the need for simplified procedures to exempt themselves from addressing the requirement for reparations to be proportionate to the harm.

## E. Conclusion

---

<sup>130</sup> *Loayza Tamayo v Peru* (Reparations and Costs) Ser C No 42, 27 November 1998, para. 86; Basic Principles and Guidelines (n 48) 15, 18.

<sup>131</sup> See generally, Howard M Holtzmann and Edda Kristjánsdóttir (eds), *International Mass Claims Processes: Legal and Practical Perspectives* (OUP 2007); Michael Bazylar and Roger Alford (eds), *Holocaust Restitution: Perspectives on the Litigation and its Legacy* (NYU Press 2006).

Despite the structural challenges inherent to the ICC Statute, there is much more the Court can do to make reparations effective. But effectiveness should not be conflated with or sacrificed for efficiency measures. These include marginalising victim's voices, arbitrarily cutting off who can benefit or arbitrarily privileging collective or symbolic reparations for perceived reasons of efficiency in those instances when these measures don't align with victims' own priorities for addressing their harms.

Greater harmonisation of approaches between chambers will help to promote efficient, predictable and fairer processes. This requires more cohesion on the Court's vision for reparations and a commitment of all the principle organs, as well as the Trust Fund, to implementing a common vision. There is a need to maximise victims' access to the procedure and ultimately to reparations which address as much as possible to the specificity of the harms they experienced, while at the same time simplifying and thereby reducing the time and cost of the process. In particular, there is a need to continue to streamline those procedures that do not directly impact on the rights of the defence (including the determination of those reparations awards that will ultimately be implemented through the voluntary resources of the Trust Fund).<sup>132</sup>

I have argued that the Court should be seeking to award and deliver "effective reparations" which should be interpreted in line with human rights principles relating to effective remedy. While the ICC is not a human rights Court *per se*, it should be seeking to uphold the fundamental rights of all persons who come within its sphere of activity. This should apply not only to accused persons, but also to victims who are key stakeholders. Greater accountability of the ICC would be a clear way in which to garner greater respect for the rights of the individuals and groups who are relying upon it for a modicum of justice for all they suffered.

---

<sup>132</sup> Raised by Delagrangé (n 39).



Victims should be consulted and involved in all stages of the reparations process – not only as participants in proceedings which affect their interests, but in the development and implementation of assistance projects and reparations awards. Lines of communication should be open to facilitate such consultation, and to promote accountability and transparency.